No. 11757

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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TIDE WATER ASSOCIATED OIL COMPANY, a corporation,

*Appellant,*

*vs.*

DAVID LAWTON RICHARDSON and BETHLEHEM STEEL COMPANY, a corporation,

*Appellees.*

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## BRIEF OF APPELLEE BETHLEHEM STEEL COMPANY.

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### Introductory Statement.

This appeal seeks reversal of a negligence judgment based on decisions of fact. Only elemental principles of law are involved.

Appellee Richardson, Coast Guard seaman first class, brought suit in admiralty jointly against appellant Tide Water Associated Oil Company, owner of the tanker FRANK G. DRUM (to whom we will refer as "Associated"), and appellee Bethlehem Steel Company (to whom we will refer as "Bethlehem"). Richardson sought recovery for injuries sustained when he fell into the port bunker hatch while attempting to cross the deck of Associated's tank vessel, FRANK G. DRUM, at night, while the vessel was docked in the Los Angeles Harbor repair yard of Bethlehem, undergoing repairs.

The trial court, who saw and heard *all* the witnesses, held that the officers and crew of the FRANK G. DRUM were negligent in failing to guard the bunker hatch, light it after dark, or give warning to Richardson that it was open.

At the trial, as in this appeal, Associated sought to throw blame for the accident on Bethlehem. The trial court decided that negligence by Bethlehem was not proved, but held further, that even if it was conceded that Bethlehem was negligent in failing to put guard ropes around the bunker hatch at 3:30 p. m. on Saturday afternoon, August 5, 1944, when Bethlehem workmen ceased work for the weekend and left the ship, this was not the proximate or primary cause of the accident, which did not happen until after 9 p. m. the following night, Sunday, August 6th.

During the intervening thirty hours the officers in charge of the ship knew the bunker hatch was open and could have roped it off. Instead, they acquiesced that this condition continue. They also had ample opportunity to provide a light at night. The trial court held that the proximate cause of the accident was failure by Associated's employees, the ship's officers and crew, to take any of these precautions.

It is elemental, and requires no citation of authority to this court, that findings and conclusions of the District Court, based upon testimony in open court, are entitled to great weight and will not be disturbed unless they are clearly against the weight of the evidence.

## Summary of Argument.

It is difficult to determine from the opening brief what points of alleged error appellant actually seeks to rely upon insofar as Bethlehem is concerned. As we finally boil it down, appellant attempts to present two points as respects the trial court's judgment dismissing the libel against Bethlehem.

The first basis of argument is that the repair contract was a contract of bailment and Bethlehem therefore became responsible to Richardson for his injury because Bethlehem was bailee and in charge and control of the FRANK G. DRUM at the time of the accident.

The second basis of argument is that negligence of Bethlehem, rather than negligence of Associated, caused the injury to Richardson.

These two points we will discuss in this reply brief. The remainder of the opening brief argument applies only to appellee Richardson, to whom we leave reply.

## ARGUMENT.

### A. Misstatements in Appellant's Brief.

Before discussing the two points stated above, we point out several statements made in appellant's brief which are not supported by the record and are representative of the false premises on which this appeal is based.

1. Statements are made at pages 3, 21, 29, 31 and 52 that the FRANK G. DRUM had been "delivered" to and was in Bethlehem's "custody" and "control" as "bailee." The trial court found that Associated was the owner and in charge and control of the tanker which was undergoing repairs pursuant to a contract which was *not* a contract of bailment. Officers and members of the crew of the FRANK G. DRUM were on board and in charge and control of the vessel while repair work was being done [Apostles 78, 79, 85].

The following evidence thoroughly supports these findings:

Exhibit D: Repair contract between Associated and Bethlehem;

Harrington [Apostles 327-361];

Schleef [Apostles 416-451];

Humble [Apostles 451-461];

Frederick [Apostles 465-478];

Bengston [Apostles 478-499].

A finding that Bethlehem was "bailee" would have been erroneous.

2. Statement is made at pages 4 and 34 that the vessel had no portable lighting equipment which could have been used. The trial court found that lighting the portion of

the ship where the port bunker hatch was located was within the control and duty of Associated [Apostles 86]. To anyone familiar with ships of the size of the FRANK G. DRUM, the statement that such a vessel "had no portable electric light equipment which could have been used to illuminate the surface of the main deck" is ridiculous. The record quite clearly establishes that such equipment was available on board.

Courtiour [Apostles 392, 407, 415];

Schleef [Apostles 421-423, 448];

Humble [Apostles 456, 458, 459].

Third Officer Humble also testified that the security officer in charge turned on the lights at night [Apostles 458-459].

3. Statement is made at pages 9, 24 and 52 that a contract with the United States had been made by Bethlehem, terms of which affected the status of the FRANK G. DRUM at the time of the accident. A copy of a supposed contract is set forth in Appendix F, pages 13-17. Appellant even goes so far as to state at page 52 that Bethlehem "concealed" such a contract from the trial court. This court, of course, cannot here consider an alleged contract which is not a part of the record.

Contrary to the statement made, *we* actually questioned Bethlehem's witness Harrington to bring out that work *was* being done for the United States' account at the time the vessel was being repaired for Associated [Apostles 330]. Harrington testified that the ship came into the yard on application of the Marine Superintendent of Associated, Oscar Lundin. Certain other repairs which the War Shipping Administration took advantage of the opportunity to have done, were arranged later.

The first suggestion that a repair contract between Bethlehem and the United States should have been introduced in evidence at the trial of this case, is in appellant's opening brief. We did not offer this contract because, in our opinion, it was not material and would certainly have been inadmissible if objected to. The only contract involved as between the parties to this litigation was the contract between Bethlehem and Associated, which was introduced as Exhibit "D." The work in the port bunker tank was Associated's work, with which the United States had nothing to do [Apostles 331].

If appellant considered that the contract under which Bethlehem did some other work for the United States was material, such contract should have been requested or questions asked about it on cross-examination of Harrington. No request was made and no questions were asked. It is improper, and outside the issues before this court, to now attempt to bring such a subject into this appeal.

4. Statements made at pages 19-21 are apparently intended to convey the impression that the War Shipping Administration, rather than Associated, was in control of the FRANK G. DRUM. Testimony and the admission of appellant [Apostles 127, 133, 470, 480, 483] proved the vessel was owned by Associated and under time charter to the War Shipping Administration. The officers and crew were provided and employed by Associated. The *control* of the vessel remained at all times with Associated. The trial court so held [Apostles 78, 80] and the record thoroughly supports the findings.

5. Statements made at pages 21, 23, 26 and 28 also suggest that the crew was under control of the War Shipping Administration. Testimony of the ship's own witnesses disproves this. They were employed by Associated

and doing Associated's work while the ship was in the yard.

Scheef [Apostles 443-444];
Frederick [Apostles 469-470].

Captain Bengston confirmed that he was in charge of the ship when it came into the yard [Apostles 479] and that guards, including a "roving guard," were employed by Associated as required by the regulations [Apostles 493-497].

## B. The Repair Contract Was Not a Contract of Bailment.

Associated recognizes this appeal must fail unless this court believes, contrary to the trial court, that the FRANK G. DRUM was delivered to Bethlehem as "bailee" for the repairs.

The repairs were arranged by oral discussions with Associated's Marine Superintendent [Apostles 327]. Written confirmation was by specifications and letters, in evidence as Exhibit "D." They do not provide that Bethlehem assumes charge or control of the vessel. Bethlehem offered testimony at the trial to show a long established custom and policy at Los Angeles Harbor, that Bethlehem, as well as other ship repair yards, will *not* take possession or control of ships during repairs [Apostles 333, 346]. The trial court rejected this offer and the evidence did not go in as offered. But there was ample admitted evidence to support the court's finding that Bethlehem did not become a "bailee."

Associated offered nothing other than statements in argument to prove that Bethlehem did become a "bailee."

Associated employed officers and crew on salary, who were on board and in charge of the tanker at all times. At the time Bethlehem was doing repair work called for by specifications, these men did other repair work such as overhauling and reconditioning life boats, and painting. Captain Bengston and Chief Officer Frederick worked every day. Guards required by regulations to be furnished by the master, vessel owner, or agent, were on the job.

Richardson expected to contact the ship's senior deck officer on watch while on board making his inspection. He looked to the ship, not Bethlehem.

No representative or employee of Bethlehem was even on board the ship at the time of the accident.

## C. Negligence of Bethlehem Was Not the Cause of the Accident.

Bethlehem owed no duty of care to Richardson. Only the owner or person in control of a vessel owes a duty of care to a licensee or invitee who comes on board.

If Bethlehem *was* negligent as respects a duty of care owed *Associated,* and such negligence caused an injury for which Associated was legally responsible to Richardson, Associated could, at most, look to Bethlehem for indemnity, or in admiralty, recovery over.

However, if Bethlehem was negligent in failing to do something its contract with Associated required it to do, such negligence would not make Bethlehem liable unless it was the *proximate and primary cause* of the injury resulting.

In order to hold Bethlehem liable the trial court would have had to find, first, that Bethlehem was negligent in connection with the work it had contracted to do on the

tanker; and second, that such negligence was the proximate and not a secondary cause of Richardson's injury.

The evidence fails to prove these points. Bethlehem did not take over or assume control of the ship or the port bunker hatch. No specific duties as to any part of the hatch were ever assumed by Bethlehem. The hatch was used only as an entrance to the port bunker tank. Bethlehem did not assume charge or control over it any more than over any other door or passageway on board the ship used by Bethlehem workmen.

The evidence did not prove *who* opened the hatch wide or *who* removed the rope. Even if it be conceded that Bethlehem should have put a rope around the open hatch on Saturday and did not do so, the ship's officers who saw the hatch was open and knew the rope was not in place, did nothing about it, and acquiesced in the condition for some thirty hours after Bethlehem workmen left the ship before the accident occurred Sunday night.

The cause of the accident was failure to light the bunker hatch after dark. What parts of the ship were to be lighted was entirely up to Associated. Third Officer Humble testified [Apostles 458] that it was the duty of the security officer on watch to turn on the lights wanted on the ship. He also said it was customary to put cargo lights on [Apostles 455].

In order to hold Associated liable the court had to find, and did find, that Richardson went aboard the tanker as an invitee; that the port bunker hatch was left open *and unlighted* at night; that this created a dangerous condition which was the cause of Richardson's injury, and that Associated was the owner and in control of the vessel at the time.

Associated argues that Bethlehem was negligent because its men did not rope off the hatch when work was stopped for the weekend. It was not Bethlehem's custom to rope off hatches with coamings adjacent to bulkheads. The trial court decided that if it agreed that this was negligence, it still was not the proximate, but only a remote or secondary cause of the accident, two nights later. The ship knew this condition existed. Chief Officer Frederick, who followed the Bethlehem workmen off the ship, so testified [Apostles 468, 469, 474]. Nothing was done about it. The ship acquiesced that the condition continue.

The open hatch was not dangerous in the day time. Anyone could see it. When it became dark the ship's officers evidently did not think it necessary to put up a light. This was the *real and proximate* cause of the accident.

### D. Authorities Cited by Appellant.

No actual error in law is urged and only two cases are cited on the points being discussed in this reply brief.

In *Long v. Silver Line,* 41 F. (2d) 367, 48 F. (2d) 15, the basis of the lower court's decision as stated in the last paragraph of the opinion, was that the proximate cause of the accident was failure to supply adequate lighting. The obligation to furnish lights under the circumstances in that case was on the repair yard. Repair yard employees were actually working at the place at the time of the accident. The injured man was a repair yard employee. (He undoubtedly brought suit solely against the

ship, because the Longshoremen's and Harbor Workers' Compensation Act would prevent suit against his employer.) The court held the ship was not responsible, and that the only fault was in failure to supply light in the 'tween deck, which was at that time entirely under the control of the repair yard. The yard was providing the lights used and its men were actually at work on board the ship when the accident occurred.

In the present case the cause of the accident was again failure to supply light. Here, however, the ship was in control at the time it became necessary to turn on the light. The failure to provide light was, therefore, the failure of the ship. Bethlehem did not even have any employees on board that day.

In *Crane Elevator Co. v. Lippert,* 63 Fed. 943 (1894), the boy employed by Western Union was injured by falling over a pile of construction material negligently left by the elevator company, which was doing work in a corridor in the building occupied by Western Union. Here also, the suit was only against the elevator company and not against the owner of the building. The court pointed out (page 946) that the obstructions were placed in the hall under a grant of authority from the owner of the building and the elevator company's duties and responsibilities were co-extensive with those of the owner. Since the suit was against the elevator company alone, the court found this concern negligent and liable to the injured boy.

## Conclusion.

The decision by the trial court was carefully reached, after a four-day trial in which all the witnesses personally testified and were seen by the court. The court then attended on board the FRANK G. DRUM to see just what the actual conditions were. The case was argued and thoroughly briefed.

The decision was essentially one of fact as to simple negligence, and only elementary questions of law were involved.

The findings are amply supported by the evidence.

The decision should be affirmed as respects appellee Bethlehem.

Dated Los Angeles, March 25, 1948.

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